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April 9, 1996

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Via Hand Delivery

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: Cracker Barrel Ex Parte Presentation in
IB Docket No. 95-91

Dear Mr. Caton:

Primosphere Limited Partnership hereby responds to representations made in an *ex parte* presentation of Cracker Barrel Old Country Store, Inc. on March 22, 1996 regarding the above referenced docket. The material presented by Cracker Barrel contains flagrant and highly prejudicial inaccuracies which are compounded by their inappropriate inclusion in an *ex parte* presentation.

Cracker Barrel has shown a lack of respect for the Commission's processes as well as the rights of the pending Satellite Digital Audio Radio Service ("SDARS") applicants, beginning with its claim that the valid SDARS cut-off should be ignored,¹ leading on to its filing of new and prejudicial material in the reply comment period,² and now continuing with its misleading and inaccurate *ex parte* presentation.³ Cracker Barrel has insisted on supplementing the record with new material in flagrant violation of Rule 1.45(b) and (c). Primosphere asks the Commission to bring an end to Cracker Barrel's abuse of the rulemaking process

¹ See Comments of Cracker Barrel Old Country Store, Inc. at 6.

² See Reply Comments of Cracker Barrel Old Country Store, Inc. at 9-11.

³ Cracker Barrel Old Country Store, Inc. Notice of Ex Parte Presentation (filed March 22, 1996).

and enforce its rules as requested by Primosphere in previous filings.⁴

In its *ex parte* presentation, Cracker Barrel rehashes its claim that more than four applicants can be accommodated in the 50 MHz of SDARS spectrum. In support of this claim, Cracker Barrel has actively sought to mislead the Commission. In a stunning display of temerity, Cracker Barrel claims that "Primosphere's latest analysis concedes the accuracy of Professor Milstein's calculation of 6 systems with 30 CD-quality channels in 50 MHz using 1/3 rate coding."⁵ It supports this bold mischaracterization by selectively quoting Primosphere's engineering analysis. A comparison of the text quoted by Cracker Barrel and the actual text of Primosphere's filing reveals how Cracker Barrel has attempted to mislead the Commission by quoting Primosphere's text out of context.

**Cracker Barrel's version
of Primosphere's
Engineering Statement:**

"There is nothing wrong with Dr. Milstein's calculations."⁶

**The actual text of
Primosphere's Engineering
Statement:** (text omitted by
Cracker Barrel is underlined)

"There is nothing wrong with Dr. Milstein's calculations; he confirms the claims already made by Primosphere and other applicants. Dr. Milstein's theoretical calculations, however, make no allowance for application in the real world."⁷

The most perfunctory reading of Primosphere's Engineering Analysis reveals that Cracker Barrel characterization of Primosphere's statement is inaccurate and misleading. Primosphere made clear in its Engineering Analysis that Dr. Milstein's analysis was purely academic and was totally irrelevant to

⁴ See Reply of Primosphere Limited Partnership at 6-7; Motion to Accept Late Filed Pleading, or In the Alternative, to Strike Cracker Barrel's Reply (filed February 28, 1996) at 2;

⁵ Cracker Barrel Ex Parte Presentation at 4.

⁶ Id.

⁷ Engineering Analysis Prepared by Richard Cooperman, attached to Motion to Accept Late Filed Pleading, or In the Alternative, to Strike Cracker Barrel's Reply (filed February 28, 1996) ("Primosphere Engineering Analysis") at 3.

real-world satellite engineering.⁸ In a blatant attempt to mislead the Commission, Cracker Barrel has taken Primosphere's recognition of the accuracy of Dr. Milstein's *academic* analysis and distorted this into a recognition that "Professor Milstein is correct."⁹

The groundless arguments Cracker Barrel puts forward for taking the extraordinary measure of re-opening the SDARS cut-off period are made even more tenuous by the actions Cracker Barrel has taken in this proceeding. Cracker Barrel has repeatedly ignored Commission rules, has failed to cite *any* precedent for re-opening the cut-off despite the abundant precedent to the contrary, and has actively sought to mislead the Commission. In addition to the legal precedent which mandates that the processing round not be re-opened, it cannot be in the public interest to take such drastic action for a party whose actions raise such serious questions, especially when that party has not even bothered to file an application for an SDARS license.

Cracker Barrel also attempts to address the claim made by Primosphere in its Engineering Analysis that Professor Milstein has ignored the realities of satellite engineering. In its defense, Cracker Barrel states that "[i]n fact, Professor Milstein has addressed the pros and cons of using slightly higher-order modulation methods, such as 16 QAM, but has stopped well short of advocating them."¹⁰ The focus of Primosphere's criticism of Dr. Milstein's calculation, however, was not his reliance on the use of higher-order modulation methods. Rather, the criticism addressed Dr. Milstein's disregard for limitations on satellite power, satellite weight, launcher capacity, international coordination and system cost.¹¹ Cracker Barrel fails to respond to any of these issues in its filing. Its arguments regarding modulation methods do nothing to address these concerns.

Cracker Barrel missed its chance to become an SDARS licensee when it failed to submit an application by the original cut-off date of December 15, 1992. To this day it has yet to explain why it missed this original cut-off and has given no reason why it should be exempted from the Commission's well-established, and strictly-enforced cut-off rules. Instead, Cracker Barrel is attempting an end-run around the cut-off rules through a relentless campaign of misleading and inaccurate filings that disregard the Commission's rulemaking procedures. This effort is contrary to the public interest and must be stopped.

⁸ See Primosphere Engineering Analysis at 3 - 5.

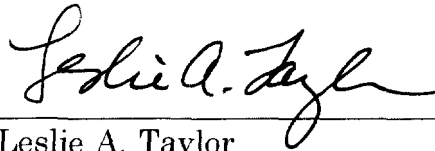
⁹ Cracker Barrel Ex Parte Presentation at 4.

¹⁰ Cracker Barrel Ex Parte Presentation at 4.

¹¹ Primosphere Engineering Analysis at 3 - 5.

The SDARS applicants have already endured significant delay in the processing of their applications. Cracker Barrel only exacerbates this delay and further postpones the public's access to SDARS services with its gratuitous and baseless arguments. The Commission must reject the arguments of Cracker Barrel and move quickly to license the pending SDARS applicants so that they can begin to provide the public with this valuable and greatly desired telecommunications service.

Sincerely,

A handwritten signature in cursive script, reading "Leslie A. Taylor". The signature is written in dark ink and is positioned above a horizontal line.

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